



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: MARCH 01, 2023

IN THE MATTER OF:

Appeal Board No. 626718

PRESENT: GERALDINE A. REILLY, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective June 17, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by THE MOUNT SINAI HOSPITAL prior to June 17, 2022, cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed September 07, 2022 (A.L.J. Case No.), the Administrative Law Judge sustained the initial determination.

Upon its own motion pursuant to Section 620.3 of the Labor Law, the Board has reopened the Judge's decision. Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked for the employer, a hospital, as a full-time housekeeper for four years, until June 15, 2022. The employer's policy require that employees swipe in and out each day with their employer-issued swipe cards; it also outlines a progressive disciplinary process. Pursuant to that process, a first infraction results in a documented conference; a second in a first warning; a third in a final warning; a fourth in a five-day suspension and a fifth in the termination of employment. The infractions do not have to be of the same nature. The claimant was aware of the foregoing.

On December 20, the claimant received a final warning following a third infraction. The infraction consisted of failing to swipe in and out on several days in November because the claimant had left her swipe card at home. The employer considers the claimant's failure to swipe to be a performance issue. On May 13, the claimant received a five-day suspension for a fourth infraction, after being seen in the janitor's closet with another individual during a non-break period.

On May 16 and 25, the claimant accidentally left her swipe card at home and was unable to swipe in and out as a result. She reported this to her supervisor and documented her time on those days via a sign-in sheet and the employer's "robo" phone assignment system. The employer discharged the claimant on June 15, 2022 because her failure to swipe in and out on May 16 and 25 constituted her fifth infraction.

OPINION: The credible evidence establishes that the claimant was discharged because she did not swipe in and out as required on May 16, and 25, 2022, thus incurring a fifth and final policy violation under the employer's progressive discipline plan. The foregoing is not in dispute. However, there is no contention that the claimant's failure to use her swipe card constituted time theft. Instead, the employer characterized her actions as a "performance issue." Under these circumstances, we find that the claimant's failure to use her swipe card on the days in question was a technical violation of the employer's policy only and does not rise to the level of misconduct. While it was the employer's prerogative to discharge her, we conclude that the claimant's employment ended under nondisqualifying conditions.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

GERALDINE A. REILLY, MEMBER